

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

HUNTERS CAPITAL, LLC, a)	
Washington limited liability)	C20-00983-TSZ
company, et al.,)	Seattle, Washington
)	
Plaintiffs,)	April 20, 2022
)	10:04 a.m.
v.)	
)	Motion for Class
CITY OF SEATTLE,)	Certification
)	
Defendant.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS S. ZILLY
UNITED STATES DISTRICT JUDGE

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Proceedings stenographically reported and transcript
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THE COURT: Would the clerk please call the calendar?

THE DEPUTY CLERK: Thank you, Your Honor. Case
Number CV20-983-TSZ, Hunters Capital, LLC, et al. versus City
of Seattle.

Counsel, please stand and make your appearances for the
record.

MR. CALFO: Good morning, Your Honor. Angelo Calfo
and Tyler Weaver on behalf of the plaintiffs.

THE COURT: Good morning, Mr. Calfo. Good morning,
Counsel.

MR. FARMER: Good morning, Your Honor. Art Harrigan,
from Harrigan Leyh Farmer & Thomsen, representing the City of
Seattle.

MR. FARMER: Good morning, Your Honor. Tyler Farmer,
of Harrigan Leyh firm, along with Joe Groshong on behalf of
City of Seattle. We are also joined by our paralegal, Kellie
McDonald, and various colleagues.

THE COURT: Good morning.

I am going to ask that presenters take their masks off
when they're presenting from the podium. Given the nature of
the COVID crisis we've got, I'm going to ask everyone else to
keep their masks on during the course of the hearing.

This matter comes before the Court on the plaintiffs'
motion for class certification in this very interesting and

1 challenging case that we have before us. I've entered two
2 minute orders recently that ask the lawyers to focus on
3 certain things.

4 The first minute order, Docket Number 90, asks some
5 specific questions of the plaintiffs dealing particularly
6 with named plaintiffs who are outside the class area that's
7 being proposed to be certified and asking about specific
8 plaintiffs in that regard. I also asked the parties to focus
9 on commonality and typicality requirements of Rule 23(a), and
10 finally, I asked the parties to address how we manage this
11 case if I deny class certification.

12 We entered a second minute order just a couple of days ago
13 asking you to be sure to read and be ready to talk about the
14 Ninth Circuit case in *Olean v. Bumble Bee Foods*, because it's
15 hot off the press from the Ninth Circuit, and it pretty much
16 tells us the landscape with respect to class certifications.
17 I also ask you in the minute order recently to talk about the
18 predominance requirement of 23(c)(4), and finally, how should
19 we manage this case if we do certify a class on particular
20 issues, because case management is obviously a very important
21 issue for the Court to determine. This is a complicated,
22 involved case with lots of issues, and so I think it's
23 necessary and certainly will be helpful to me if you can
24 address the management issues, whether or not I certify a
25 class.

1 All right. It's the motion of the plaintiff to certify,
2 so I'm going to permit the plaintiff to go first and last.
3 I'm going to suggest a time limit of not more than an hour
4 per side. Plaintiff can reserve whatever they wish. As the
5 lawyers know, I ask a lot of questions during oral argument,
6 so your time may be used up with some questions from time to
7 time, but plaintiff may proceed.

8 Mr. Calfo, I haven't seen you for a long time. You used
9 to come into this court on a regular basis. Welcome back.

10 MR. CALFO: Yes, Your Honor. I had to look around
11 and find out where I could get to your courthouse, but I
12 remember, it used to be at the old courthouse, I recall.

13 THE COURT: Right.

14 MR. CALFO: That was a lot easier for me to get to.

15 Your Honor, Angelo Calfo on behalf of plaintiffs. I
16 wanted to give the Court an idea of what I plan to do during
17 my argument to begin with. I'm going to start with a
18 discussion, a brief discussion, of the facts, of the
19 foundational facts that I think give rise to our meritorious
20 request to the Court that it certify certain issues in this
21 case for class treatment. Then I'm going to go directly to
22 the Court's minute orders, because I know these are the
23 things that the Court has on its mind, and I am going to
24 address each of them.

25 Following that, Your Honor, if there are any cleanup

1 issues -- I have a couple of things I want to address, but
2 I'll clean up at the end of that. I doubt I'll take an hour,
3 Your Honor, but who knows? Maybe, with the questions, I'll
4 end up at that time. I always say I am going to take less
5 time than I do, as you know, Your Honor.

6 So, Your Honor, this is a case about City policy. It's a
7 case about a course of conduct by the City. That's really
8 important to this issue of class sort of issues. It was that
9 course of conduct and it was that policy that led to,
10 essentially, a takeover of a 16-block area of Capitol Hill, a
11 takeover that was facilitated by the City.

12 And what kind of effects did that takeover have? Well, we
13 know it resulted in the blocking of public access to streets,
14 blocking of access to private property, to a park, to
15 sidewalks. We know that it resulted in a lack of public
16 safety. We know that the takeover occupants had their own
17 security force, and the City essentially ceded security to
18 this group. They did not respond to requests from residents,
19 property owners, and businesses in this area to reports of
20 violence. The chief of police talked about rapes and
21 robberies and assaults that went unresponded to.

22 Your Honor, that's why the City's conduct harmed thousands
23 of residents, businesses, and property owners. We've
24 estimated there's about 5,000 members of the class, and we've
25 also identified, I think, Your Honor, the types of harm that

1 resulted from what the City did in our papers.

2 Now, when it comes to City policy, Your Honor, I don't
3 think there's a mystery here. The City laid out its policy
4 in writing. It laid out its policy in statements from the
5 Mayor, from the police chief and the fire chief.

6 And I point the Court, in particular, to Exhibit 7 of the
7 Weaver declaration on our motion. This is the emergency
8 order that the City issued in July of 2020. And in terms of
9 describing what happened here and what the City's policy was
10 and how it facilitated the occupation, I couldn't have
11 written it better myself. They used the word "facilitation."
12 They used the words, "We blocked access to public streets,"
13 "We didn't respond to public safety reports from the area."
14 They detail in every way the way they facilitated the
15 occupation by providing hygienic materials, by providing
16 barriers to allow -- to block access to public property and
17 rights-of-way and a variety of other things that they did,
18 Your Honor. It's all right there in Exhibit 7, and this has
19 nothing to do with any plaintiffs. This has entirely to do
20 with the conduct of the City and its policies.

21 Your Honor, the City's also admitted that it caused
22 widespread damage to the residents of this neighborhood. We
23 don't have to look any farther than the police chief. The
24 police chief's statement on July 1st of 2020 talks about how
25 she walked around the area, and I was taken by her own

1 description and how important it is to the facts of this case
2 and this class motion. She says, when she walked through,
3 she was absolutely -- she saw absolute devastation,
4 devastating damage to the neighborhood. She was stunned --
5 stunned -- by the amount of graffiti, garbage, and property
6 destruction. These are her words. She said, "We don't even
7 know how much trauma people were experiencing."

8 So, Your Honor, what we have is the existence of policies
9 that are provable independent of anything that any plaintiff
10 did, and we have the admission of harm to the class from the
11 police chief, herself. I mean, this is just -- these are
12 just examples, Your Honor. There's a lot of other evidence
13 that we've adduced and put into our motion papers that show
14 the existence of policy, the existence of facilitation, the
15 existence of harm.

16 Your Honor, on the plaintiffs' side, we've presented
17 evidence from -- in the form of narratives from the named
18 plaintiffs. This is a wide group of -- or a diverse group, I
19 should say, of named plaintiffs. They include people who
20 resided in the area; they include people who are business
21 owners; they include property owners. I mean, you read these
22 narratives, Your Honor --

23 THE COURT: Well, take a moment and answer one of the
24 questions I asked about what your position would be with
25 respect to plaintiffs outside the class area that you have

1 designated. There are about six or seven of them. How do
2 they fit into this puzzle? Are they going to just be
3 separate plaintiffs, the Dunn Motors Building, the Greenus
4 Building, the Colman Building, the Madrona Real Estate
5 Investors transactions? Some of these buildings are several
6 blocks away from your class area. What are we doing with
7 those?

8 MR. CALFO: Your Honor, I'm going to submit to Your
9 Honor that this is not a complicated problem and it can be
10 solved pretty easily. Just to set the stage, Your Honor,
11 what the -- there are three plaintiffs that are not members
12 of the proposed class or named class members. That's Madrona
13 Real Estate Investors IV, Madrona Real Estate Investors VI,
14 and the Greenus Building, so they are plaintiffs, and they
15 aren't members of the proposed class. That's three
16 plaintiffs. Your Honor --

17 THE COURT: I'm sorry, Madrona VI, the Greenus
18 Building, and what was the other one?

19 MR. CALFO: Madrona IV, Your Honor.

20 So you have those three. And then you have named
21 plaintiff capital -- Hunters Capital that had buildings --
22 they had buildings inside the area, and they had buildings
23 outside the area. The buildings outside the area are Dunn
24 Motors, Greenus, and Colman, and Redside has a building at
25 1323 Pine, which is outside the area.

1 So the question is, what do we do -- if the Court were to
2 certify these questions, what do we do with these plaintiffs
3 at trial? And we submit, Your Honor, that these plaintiffs
4 can go forward at the same time as the class plaintiffs, and
5 the reason is, is that there's complete overlap between what
6 they have to prove at this upcoming trial and what the class
7 members have to prove. They have to prove the City policy;
8 they have to prove the course of conduct; they have to prove
9 all the common questions that we've listed in our Exhibit 1
10 to our motion.

11 THE COURT: Well, then, let me ask you a different
12 question, related.

13 MR. CALFO: Yes.

14 THE COURT: Why isn't the class area that you're
15 proposing larger than -- how do you draw a line as you've
16 proposed? What about the people in the next block or the
17 block after that? A couple of these are five, six blocks
18 away. The Colman Building is the furthest away. How do you
19 rationalize drawing these lines in such an arbitrary way?

20 MR. CALFO: Well, Your Honor, we didn't do it in an
21 arbitrary way, with all respect. I think what we did was we
22 took the City's definition of the zone and we applied it to
23 the class. This is what the City said the CHOP neighborhood
24 was in its emergency order and in other promulgations, and we
25 felt that in order to -- you know, in defining the class in

1 the way that best fits the case, that it would be appropriate
2 to use the City's definition. And I, again, would point to
3 Exhibit 7, which is the emergency order that references that
4 specifically, but there's a lot of other evidence where this
5 is what the City said the zone is that they facilitated.

6 So I would say, Your Honor, you know, the Court has the
7 discretion to widen the barrier. We don't think that's the
8 right thing to do. We think it might be better, Your Honor,
9 in this instance, to allow all the claims to go forward at
10 the same time, because I think there's substantial overlap of
11 issues.

12 Another option, if the Court's concerned about that, would
13 be to bifurcate those issues out. We don't think that's
14 necessary. We think it would be more efficient to just try
15 them at the same time. I don't think it's a burden to the
16 class members. It's not a conflict. I don't think it's a
17 significant burden to the City once the class is certified.

18 So, I mean, these folks outside the area are going to have
19 a different damage claim, because they're going to have to
20 show that the effects inside the area also affected them
21 outside, but any claim outside the area is going to have to
22 include evidence of what was going on inside the area anyway,
23 so there's really no difference in proof when it comes to --
24 if these folks were to bring their own claims individually,
25 they're going to end up having to bring in evidence of what

1 was going on in the area defined by the City as "CHOP."

2 THE COURT: Well, another alternative, of course,
3 would be, assuming there was a class case, to make it the Red
4 Zone, which is a slightly different and less of an area than
5 your proposed class. What would be your views on that?

6 MR. CALFO: Well, Your Honor, again, I think the
7 evidence tends to show that where the obstruction was with
8 respect to public rights-of-way, where the impact was in
9 terms of economic harm and other kinds of harm was in the
10 zone defined by the City as the "CHOP." This was the zone
11 where there was limited public safety response or no response
12 at all and where there was, over time, blocking of public
13 rights-of-way and blocking of private property.

14 So we think that -- our basic premise is, Your Honor, we
15 think it's best to use the definition that the City used for
16 the CHOP neighborhood for what it facilitated, for where it
17 says the harm occurred; for example, Police Chief Best's
18 statements and those kinds of things. It seems to match up
19 best with our proof when it comes to harm and facilitation.

20 THE COURT: All right. Go ahead.

21 MR. CALFO: Your Honor, I was talking about the
22 City's admissions and talking about the City's policy and its
23 admission as to its policy and the harm to the people in the
24 class and the narratives that we presented from each of the
25 plaintiffs that talk about the harm they experienced.

1 Now, another thing we did here, Your Honor, is we
2 submitted the declaration of Rich Fox. He was the owner of
3 Poquitos. And I want to point that out in particular,
4 because the City, in its opposition, made Mr. Fox the poster
5 child of class members that didn't support this lawsuit and
6 who believe there was little business impact to the
7 neighborhood resulting from CHOP.

8 Your Honor, when you look -- we went out and talked to
9 Mr. Fox after the City pointed him out. We obtained the
10 declaration that's there, and he describes a chaotic and
11 threatening environment. He describes men walking around
12 with machine guns strapped to their backs, extensive damage
13 to property, the need to close his restaurant because of the
14 unsafe environment, extortion of businesses. This is the
15 person that they picked out as the one who's going to show
16 that there's diversion between the class members and the
17 plaintiffs, and this just didn't bear out, Your Honor, so I
18 think that's worth pointing out.

19 Your Honor, finally, on the facts, the text issue. What
20 we have discovered in the course of discovery is that the
21 Mayor, the police chief, the fire chief, and many other heads
22 of the police department destroyed all their texts related to
23 this time period. I mean, it's astounding. They've all got
24 silly and inconsistent stories about how it happened, but
25 you've got a course of conduct here where these texts are

1 missing.

2 THE COURT: Do you know of any case that has
3 certified a class issue dealing with a discovery matter or an
4 evidentiary issue?

5 MR. CALFO: Yes, Your Honor.

6 THE COURT: What would be your case or cases that
7 would support making that an issue, a class issue?

8 MR. CALFO: Your Honor, the *Olean* case, I think, is
9 probably the best case to look at.

10 THE COURT: It's certainly the most recent, isn't it?

11 MR. CALFO: It is, Your Honor.

12 THE COURT: I'm sure that all the lawyers saw that
13 case immediately when it came out last week, but to be sure
14 all of you were familiar with it, we made that sure by the
15 minute order. I think that *Olean* helps you with that.

16 Isn't the problem or the issue with respect to these
17 missing texts that the solution is perhaps going to be some
18 sort of spoliation ruling or instruction, but that doesn't
19 move the needle forward one bit with respect to the merits of
20 all of these issues that you've also teed up. I don't see an
21 evidentiary issue like that being a class question or a
22 reason to certify or not certify a class. So show me in
23 *Olean* how you think that issue would be a class issue.

24 MR. CALFO: Well, Your Honor, I think what I'm
25 thinking of is that what they say in *Olean* is that the common

1 issues don't have to relate to an element of the cause of
2 action, and they -- *Olean* makes the -- gives an example of a
3 wage-and-hour class action where there's a question about how
4 much time a worker spent donning on and off his equipment,
5 and what the court said was that was a perfectly appropriate
6 class factual issue to certify under 23(c)(4).

7 And I guess what I -- what I'd submit to Your Honor is
8 that the Court could, similarly, just like *Olean* suggested
9 you could, is certify this factual issue about what it is the
10 City did. What were the circumstances surrounding the
11 deletion of these texts, and what should be the sanction that
12 results from that?

13 THE COURT: Well, but it also -- the *Olean* court says
14 that a common question will resolve an issue that's central
15 to the validity of each one of the claims in one stroke,
16 citing *Wal-Mart*.

17 How would the text issue resolve a central issue with
18 respect to each of the different claims? You've got a
19 procedural due process, a substantive due process, a taking,
20 a negligence, and a nuisance claim. All of them have
21 different elements. How would this particular issue
22 essentially move the ball forward with respect to all of
23 those claims?

24 MR. CALFO: Well, Your Honor, it depends on the
25 Court's -- the outcome. So if the outcome is that the Court

1 finds that it's going to issue a sanction against the City on
2 liability, it will advance the case. Your Honor, you're
3 going to be pretty shocked when you hear what we're finding
4 when it comes to the deletion of these texts.

5 THE COURT: Give me a two-minute heads-up.

6 MR. CALFO: Well, Your Honor, the Mayor, in her
7 deposition, said that she lost -- the texts were lost because
8 she was walking on the beach on July 4th and dropped her
9 phone into the water, and somehow that resulted in the phone
10 going, you know, haywire. But then, somehow, she took the
11 phone back to her home and was able to go onto an iCloud
12 platform, and she deleted the backup at that time of all of
13 her texts from the relevant time period and replaced it with
14 an older backup.

15 We then talked to the technicians at the City who were
16 involved in managing the phone after it allegedly went into
17 the water, and the technicians in the City were never told by
18 the Mayor that the phone went into the water or that the
19 water had anything to do with the deletion of the texts or
20 the phone not working.

21 They also said -- the technicians -- that had the Mayor
22 told them that at or about the time the texts were missing,
23 they could have recovered the texts. I mean, I don't know,
24 Your Honor, I mean, that's -- then, okay, so the Mayor's
25 texts are all gone.

1 Then, the fire chief says, after we sent our letter to the
2 City, on the day we filed the Complaint, and we said,
3 "Preserve the texts." I'm not joking, Your Honor. Exact
4 words: "Preserve the texts of the Mayor, the fire chief, and
5 the police chief." That simple. And months after we sent
6 that letter, the fire chief goes into the Apple store and has
7 his phone reset.

8 How about the police chief? The police chief says her
9 texts are all missing, too. Why did that happen? Well, the
10 police chief says she -- when she turned her phones in, the
11 texts were there. When she turned her phones in to the City
12 after she left, the texts were there. She may have deleted a
13 few texts here and there, yeah, but she had no explanation
14 for what happened to the texts between the time they were
15 submitted on her resignation until the time we obtained them.

16 I mean, it's outrageous, really. And you know, there's a
17 series of other police officers, you know, high up in the
18 police department that also had missing texts from the time
19 period. We don't have their texts from the whole period of
20 time from CHOP.

21 I mean, Your Honor, you know I was a prosecutor for a long
22 time. I can tell you --

23 THE COURT: I do remember that, Mr. Calfo.

24 MR. CALFO: -- I don't -- I never saw a destruction
25 of evidence of this nature when I was a criminal prosecutor.

1 So I told -- and I've said this -- I'm going to get to the
2 bottom of it, and we have. We've hired an expert. The
3 report is currently in the hands of the City. I haven't even
4 had a chance to look at it yet, but that expert has taken a
5 look at what the City did to investigate that. It issued the
6 most vanilla, milk-toast report on what happened to these
7 things, but our expert has that report, analyzed it, analyzed
8 the phones, and another report will be coming out after the
9 City reviews it for privilege. And I think -- you know, I
10 don't know what's going to happen, but based on the
11 coincidences and the circumstances, I suspect we're going to
12 get some really interesting information from our review of
13 the phones.

14 THE COURT: Would that review -- one of the questions
15 I have, a lot of the -- you've teed up almost 30 different
16 questions that you say are common. I have dealt with many of
17 them, but are there some that should be teed up in the motion
18 practice before we decide class certification?

19 MR. CALFO: Oh, yeah, Your Honor, I think, if the
20 issues are certified, we intend to move on several of them.

21 THE COURT: Well, as a practical matter, Mr. Calfo,
22 whether or not the case is certified as a class, if you move
23 and if I decide on some of these issues as you would hope I
24 would, the City's bound and everyone who's got a claim would
25 have the benefit of that ruling; would they not?

1 MR. CALFO: The same in *Olean*, Your Honor.

2 THE COURT: Well, what's the difference?

3 MR. CALFO: Well, what I'm saying is that, in *Olean*,
4 the same would be true. If the named plaintiffs went to
5 trial and they got a favorable verdict, then all of the other
6 indirect and direct purchasers would be able to use that,
7 wouldn't they? So, I mean, it sort of undermines the entire
8 concept of the class to rely on collateral estoppel.

9 The other side of it is, if we lose, from the Court's
10 perspective and the City's perspective, then those class
11 members' claims are cut off, and this is one of the reasons
12 why we have the class action vehicle, is because it can both
13 benefit the class members and it can also benefit the Court
14 in terms of judicial efficiency. It can benefit the
15 defendant in order to have class claims resolved to their
16 favor as opposed to dealing with a bunch of individualized
17 claims.

18 THE COURT: Let me ask you this: You, as I've
19 indicated, described or listed approximately 30 of these
20 different questions. What if I were to conclude that there
21 were a handful of issues that would move the case forward in
22 a sense that would, perhaps, justify class certification with
23 respect to those issues --

24 MR. CALFO: Yes, Your Honor.

25 THE COURT: -- but that there were another 25 or so

1 questions which would not be certified. The *Olean* case has
2 some language in it, and I want to read it to you and ask you
3 what you think.

4 MR. CALFO: Yes, Your Honor.

5 THE COURT: But it says -- I'm on page 6 of my
6 Westlaw's printout, but it's at II, A, second paragraph. "A
7 common question must be of such a nature that it is capable
8 of classwide resolution -- which means that determination of
9 its truth or falsity will resolve an issue that is central to
10 the validity of each one of the claims in one stroke."

11 And then, on the next page, it goes on and says, "By
12 contrast, an individual question is one where members of the
13 proposed class will need to present evidence that varies from
14 members to members." Setting aside this cell phone problem
15 and the texts, aren't most of the issues that you've
16 attempted to describe as questions common to the case really
17 individual questions where evidence will vary from member to
18 member?

19 In other words, take your due-process claim or your taking
20 claim. I mean, the interference is clearly different from
21 plaintiff to plaintiff, and if we had a class, it would be
22 individual to everyone in the class; would it not?

23 MR. CALFO: Your Honor, I don't think so.

24 THE COURT: Why not?

25 MR. CALFO: Well, first of all, let me just, as a

1 background --

2 THE COURT: Let me ask first.

3 MR. CALFO: Yes.

4 THE COURT: If I concluded -- I realize you have a
5 different view.

6 MR. CALFO: Yes, Your Honor.

7 THE COURT: But if I concluded there's a handful of
8 questions that could be certified, but there are many others
9 that you've proposed which I could not certify, does that
10 prevent class certification, or can I move forward with a
11 limited number of these questions?

12 MR. CALFO: Yes, Your Honor. Let me answer that
13 question directly. It's really raising a predominance issue,
14 it sounds like, to me. And this is a really important point
15 for our motion, really important, and that is the holding in
16 *Valentino* that was affirmed by *Olean*, and that is, when you
17 look at predominance, the issue of predominance in a 23(c)(4)
18 case, you only look at predominance as to the particular
19 issue that is being certified.

20 So the answer to your question is, yes, if the Court found
21 one issue in here that was common to the class and would
22 advance the litigation, it should certify it whether or not
23 it certifies the other two dozen, because that's what the
24 Court -- that's what the law is under the Ninth Circuit.

25 THE COURT: You've listed lots of questions you want

1 me to certify. What do you think your four or five strongest
2 questions are?

3 MR. CALFO: Well, Your Honor, just as a general
4 matter, what we tried to do in every instance was focus on
5 questions that had entirely to do with the City's policy and
6 course of conduct, because that's what we're focusing on.
7 And if we agree with you, Your Honor, if we start getting
8 into the conduct of individuals, harm to individuals, we're
9 talking about the damages phase. And *Olean*, of course, says,
10 you can deal with liability issues and damages later.

11 And I will submit to Your Honor that the variations that
12 you're referencing all go to damages, but to answer the
13 Court's question -- and I think it would be hard for me to do
14 that in a way, because I'm picking and choosing among my
15 own -- you're making me negotiate against myself. But let's
16 just take -- let's just take the third cause of action to
17 start with. This is the takings clause action. Now, Your
18 Honor, I think really important on this one is that we are
19 seeking a ruling that the City's actions constituted a per se
20 taking of rights of the members of the subclasses.

21 So we're not asking you -- and we are not going to ask the
22 jury -- for class purposes, to look at individual takings
23 that may have occurred. We have cited the Supreme Court case
24 in our briefing where the Court says that if an organization
25 or if the government institutes a policy that gives the

1 opportunity for third parties to invade the private property
2 rights of the plaintiff, that is a taking.

3 Now, the City may disagree with our interpretation of the
4 law, but that just makes it more of a common question.
5 That's just an issue that can be resolved on a class basis
6 whether our per se taking theory is valid.

7 THE COURT: Would that taking theory also require us
8 to look at -- is a temporary interference with one's property
9 or access always a taking under the Constitution?

10 MR. CALFO: Under this case, Your Honor, it's a per
11 se taking, and we're entitled to nominal damages.

12 THE COURT: When you say "this case," what case are
13 you referring to?

14 MR. CALFO: Well, Your Honor, I can -- let me give
15 you the case. One second. I can get that case for you, Your
16 Honor. It's cited in our briefings.

17 THE COURT: Perhaps on your rebuttal you can give me
18 the cite.

19 MR. CALFO: Yes, Your Honor, thank you. But that's
20 an example.

21 The other issue on that same thing is, was the taking
22 justified because of an emergency, and this is an issue that
23 the City raises with respect to a number of our causes of
24 action that we are seeking -- the issues that we're seeking
25 to certify. And this is where I think *Olean* is also very

1 instructive, Your Honor, because what I think *O'lean* said is
2 that, look, plaintiffs can raise a classwide issue, and the
3 Court may think it's not that strong, you know, or they won't
4 prevail, and the City may come up with its own conclusion or
5 rebuttal to that theory, but the fact -- it isn't a question
6 of the validity of the claim. The issue is whether or not
7 the resolution of it will advance the litigation as to that
8 common question.

9 So, when it comes to whether or not what the City did here
10 was justified either as an emergency under our takings
11 theory, our per se takings theory, or under our substantive
12 due process theory where they also claim that what they did
13 was justified, that's an issue that can be resolved on a
14 classwide basis. And that's going to really advance the
15 litigation for all the class members, because if this jury
16 were to find that the City did act in a way that its policy
17 was a per se taking and if the jury were to find that their
18 emergency justification was invalid, well, then, you've
19 really -- all you've got is damages left, essentially, at
20 that point and individual damage claims as to the extent of
21 deprivation.

22 So that's an example, Your Honor. And I think, again,
23 we're focused entirely on the conduct of the City and its
24 City policy and the City's arguments justifying its behavior.
25 Those are all things that have nothing to do with variations

1 in the class or personal experiences of plaintiffs or class
2 members.

3 Another --

4 THE COURT: And help me understand your per se
5 argument or what you're saying is a per se violation.

6 MR. CALFO: The example -- the case that I cited --
7 and it's called *Cedar Point*, Your Honor -- that case involved
8 a situation where the government required -- I mean required
9 a defendant to allow union representatives to come onto its
10 property to advocate for the union. The court found that was
11 a per se taking, because there was a policy initiated by a
12 government agency that permitted -- that allowed -- the
13 deprivation of property, and that case found that it was a
14 per se taking.

15 We think that's very much like the situation here where
16 the City has admitted that it's facilitating, encouraging,
17 aiding in the takeover of this zone in a manner just like
18 the union representatives going onto someone's private
19 property, which is a far less impactful type of taking
20 than --

21 THE COURT: But that case -- that one issue was
22 really dispositive of the case; was it not? In other words,
23 whether or not the regulation or the ruling that allowed the
24 union organizer to go on the plaintiffs' property was or was
25 not a taking. That seems, to me, a fairly limited issue.

1 How does it apply in this case?

2 MR. CALFO: Well, Your Honor, I think it's directly
3 analogous, because just like the union individuals that were
4 going on the property and -- you know, they were permitted by
5 policy of the government to go onto the property. Here,
6 you've got the City facilitating a large group of individuals
7 to occupy an area to the detriment of the property rights of
8 everybody inside the zone. I mean, I think it's directly
9 analogous.

10 And again, Your Honor, I just want to emphasize that
11 whether you think our argument is good or bad, it's common.
12 If you resolve that issue against us, it's common. If you
13 resolve that issue in our favor, or if the jury does, it
14 advances the litigation on the takings theory.

15 There may be other takings theories that are presented,
16 but this is the one that we're seeking to certify, because it
17 does not -- it doesn't depend on variations of experiences of
18 class members, and that's why we think it's a common question
19 that can be certified under 23(c)(4).

20 You know, another example, Your Honor, is to look at the
21 substantive due process claim. We ask you to certify, "Did
22 the City's affirmative actions or statements create or expose
23 the class to an actual particularized danger the class would
24 not have otherwise faced?" And as the Court said in its
25 order on the motion to dismiss, it thought that, sure, I can

1 understand how that would be a common question, and indeed,
2 our evidence has shown that it is. You know, when you're
3 talking about the particularized dangers, you're talking
4 about types of dangers. You're not talking about individual
5 experiences. The City's affirmative actions and statements
6 led to taking -- you know, the loss of property rights,
7 economic loss, business interruption, emotional trauma.
8 These are all types of harms that the City's conduct, as
9 expressed in this particular issue, caused.

10 Another one, Your Honor: "Was the City deliberately
11 indifferent to the known dangers?" There is no issue
12 relating to any individual plaintiff that is going to bear on
13 that common issue, and that is, "Was the City deliberately
14 indifferent to the known dangers?" No plaintiff can say a
15 thing. No plaintiff's experience is going to change whether
16 or not the City was deliberately indifferent.

17 The same is true with foreseeability, Your Honor. You
18 have an email from the Mayor -- an email from the Mayor --
19 where she says, at the outset, I told you, fire chief and
20 police chief, that if you don't have to let public safety
21 agencies respond to that area, this kind of action -- that
22 was a homicide -- are foreseeable and preventable. Her
23 words.

24 Now, what evidence can the plaintiffs shed on that issue?
25 It's all the Mayor. She said it. She admitted it. And

1 there's other evidence just like it. We'll show deliberate
2 indifference from the City's conduct that has nothing to
3 do -- we'll show foreseeability from the City's conduct and
4 their state of mind and what they contemplated. Nothing to
5 do with any plaintiff. That's why these are common questions
6 that 23(c)(4), I think, contemplates can be certified. And
7 they'll give the Court and future class members, if we're
8 successful, the ability to use that liability finding -- and
9 we think there will be one -- to obtain compensation they
10 wouldn't otherwise be able to obtain but for the class
11 vehicle.

12 "Were the City's actions and statements pursuant to
13 policy?" Your Honor, that's our fourth one under substantive
14 due process. Again, this relates entirely to City conduct.
15 It relates entirely to evidence of what the City did or
16 didn't do. Did they have a policy? Well, look at Exhibit 7,
17 the City's emergency order. I couldn't -- as I mentioned,
18 Your Honor, I don't think the policy could be any more
19 clearly laid out than the Mayor and the City did itself in
20 that document.

21 And then, of course, the last one under nominal damages,
22 that's clearly a --

23 THE COURT: Well, I mean, you list that as the
24 nominal damages issue, but if you recover under a 1983 claim,
25 doesn't the law say you get nominal damages if you can't

1 prove actual damages?

2 MR. CALFO: Yes, Your Honor.

3 THE COURT: I mean, there's nothing to talk about
4 there, is there? Why would I certify such an issue?

5 MR. CALFO: Well, Your Honor, because then the case
6 will be over as to that issue and it won't matter whether or
7 not there are actual damages, or not.

8 THE COURT: But why would I certify an issue that I
9 don't imagine that the City is going to have a different view
10 of? Isn't the law clear that if you establish liability, but
11 you can't -- some of your clients can't establish actual
12 damages, they get nominal damages? Is that the law or not?

13 MR. CALFO: I believe it is, Your Honor.

14 THE COURT: Well, then, why would we certify that as
15 a common question?

16 MR. CALFO: Well, because it is, but, Your Honor, you
17 know what? I'm not going to die on the mountain for that
18 issue, okay? Let's look at the first four. I mean, it's
19 pretty clear. If you don't like nominal damages, just cut it
20 out, but I don't think it harms anybody, but I do think the
21 first four issues that are referenced in the substantive due
22 process claim all relate to the City's conduct and are
23 certifiable under 23(c)(4).

24 Your Honor, I think the same is true with respect to these
25 other issues. You know, just as a general statement, Your

1 Honor, there's almost a concern raised that we have so many
2 issues that we're trying to certify, but in a sense, the
3 larger the number of issues that can be certified as a common
4 question, the greater the advancement in the litigation. So,
5 I mean, the desire to identify all of the common issues that
6 can advance the litigation I think is a positive.

7 And I think what I'd ask the Court to do is, as it looks
8 at these questions, it asks -- the Court asks, "Does it
9 really matter what a plaintiff experienced or not for me to
10 be able to answer that?" Because that's what -- that seems
11 to be the focus of the City. Well, we don't know what --
12 this person says this, and this person says that. Well,
13 fine. It doesn't really matter, because we're talking about
14 the City's policy; we're talking about whether the City was
15 deliberately indifferent; we're talking about whether the
16 City foresaw the danger; we're talking about whether there
17 was a per se taking; we're talking about whether the City's
18 conduct blocked right-of-ways, not having anything to do with
19 the plaintiffs.

20 THE COURT: Take a moment to tell me how you would
21 manage the case if I certify a class and how long that trial
22 would take on liability, because damages would be bifurcated,
23 presumably. And if I did not certify a class, what are we
24 talking about?

25 MR. CALFO: Well, Your Honor, if you do certify a

1 class, we intend to go to summary judgment, and we'll further
2 narrow the issues for trial. And then there will be common
3 questions to present to the jury for the named plaintiffs,
4 and we submit the Court should hold a trial on damages at
5 that same time.

6 So what you are going to get as a result of that is an
7 enormous advancement in the litigation. You're going to get
8 jury verdicts on all the common questions, and you're going
9 to get the reaction of the jury in terms of damages as to
10 residents, as to business owners, and as to property owners.
11 And that's going to inform the Court on how it's going to
12 conduct further damages trials, because we're going to be
13 able to find out how much the damages are, what kinds of
14 proof is going to be required, and the like. So the Court
15 may decide after we win on the first trial that we can try 50
16 residents at a time. I don't -- you know, it just depends on
17 how the proof comes out.

18 The other important thing, Your Honor, is that -- and this
19 is recognized in the case law -- it's going to be a
20 bellwether trial to determine what the damages are likely to
21 be.

22 THE COURT: And how long is this bellwether trial
23 going to take?

24 MR. CALFO: Well, Your Honor, I don't think it's
25 going to take that long, to tell you the truth. I mean --

1 THE COURT: Well, that's not helpful.

2 MR. CALFO: Well, we're not talking about a
3 three-month trial. I think we've estimated four weeks.

4 Your Honor, you know, a lot of these issues, I think --
5 we're not going to overtry this case. A lot of this comes
6 right out of the mouth of the City, and we're going to focus
7 on damages. The City has spent all of its time in discovery
8 picking apart our clients' damage claims. I mean, they
9 raised -- it's one of the reasons not to certify the class,
10 is because their clients have huge damages claims on the one
11 hand, and on the other, their position is, we don't have any
12 damages. So, I mean, they're focused on damages.

13 The question is going to be whether, for businesses, for
14 example, it was COVID or whether it was CHOP. We think we're
15 going to prevail on that issue. There are questions about
16 individual experiences in the CHOP that are going to have to
17 be sorted out, but like I said, Your Honor, I think it would
18 be a four-week trial.

19 But our goal, Your Honor, is once that trial is done, I
20 think the Court can -- we can regroup, and we can figure out
21 how to deal with the rest of the class claims. Some
22 claimants may not want a trial or want to make further
23 claims, but when we get the additional claims, we can figure
24 out how many more people there are to address and how we're
25 going to best resolve them.

1 And I guess I'd point back to *Olean*. Imagine what the
2 damage phase of those trials are going to be like if it goes
3 to trial. That didn't prevent the Ninth Circuit, en banc,
4 from saying this is a good way of managing a class action.

5 THE COURT: But the issue there was fairly
6 straightforward. There were three different classes in
7 *Olean*, but they really all focused on the expert witness
8 testimony and what would be believed in terms of antitrust
9 influence, if you will, whether there was a conspiracy or
10 not. It's a fairly clean, simple case compared to your
11 claim, which involves three different classes, you say -- I
12 want to ask you about that in a minute -- but really
13 separate, diverse claims. It seems to me it's a much more
14 complex case, this one.

15 MR. CALFO: I'm not sure, Your Honor, because when I
16 read the -- first of all, we don't know all the facts from
17 the opinion. I want to look at the complexity of it as it's
18 presented, but I notice, for example, that the defendants
19 were saying, look, these larger companies can negotiate down
20 prices, and they have a -- there's a different damage theory
21 with respect to them. And I'm sure there would be lots of
22 other variations with respect to -- depending on the size of
23 the purchaser and the nature of their claims.

24 THE COURT: So let me ask you this about your various
25 classes that you've outlined. In your plaintiffs' statement

1 of common issues filed at Docket 66-1, you list all of those
2 common issues, but you don't explain why you need subclasses,
3 because in each instance, you describe -- for example,
4 procedural due process, you say it applies to all three
5 subclasses. And then, the substantive, you say "entire
6 class," and you either say "all three subclasses" or "entire
7 classes," so my question: Why would we need more than one
8 class?

9 MR. CALFO: That's a good question, Your Honor. I
10 think the idea was to identify the different types of harm
11 that these folks suffered, and you'll notice that one of the
12 things we did is identified whether the subclasses under the
13 third cause of action are entitled to nominal damages. But
14 if the Court is not going to certify that, it's not necessary
15 for --

16 THE COURT: Well, I'm just trying to understand
17 why -- if I certify a class, what would be the benefit or the
18 need to certify subclasses? Isn't that making it more
19 complicated?

20 MR. CALFO: Well, Your Honor, I think it's really for
21 purposes of the follow-on trials. You are going to have
22 subclasses of people that have different types of harm.

23 THE COURT: That would be the damage part. We could
24 certainly bifurcate, ultimately, in some way, but with
25 respect to liability, it seems to me that all of these

1 plaintiffs and everyone in your proposed class, or some area,
2 have got -- there's no difference in terms of the issues
3 you've raised.

4 MR. CALFO: Well, Your Honor, I'm in favor of getting
5 from point A to point B in the best way possible, and if the
6 Court thinks you don't need the subclasses to certify, I'm
7 fine with that. I think we were thinking that, to address
8 questions of variations among the class when it comes to
9 takings and procedural due process, that it might be helpful
10 to distinguish between the types of harm these different
11 folks suffered, but again --

12 THE COURT: All right. You've got about 10 minutes
13 left. Do you want to reserve?

14 MR. CALFO: I do, Your Honor. Thank you very much.

15 THE COURT: Thank you.

16 MR. FARMER: Good morning, Your Honor.

17 THE COURT: Good morning, Counsel.

18 MR. FARMER: As I mentioned at the outset, my name is
19 Tyler Farmer, and I'm at the law firm Harrigan Leyh,
20 representing Defendant City of Seattle.

21 Your Honor, we've got some maps that we want to look at
22 this morning, because we think that maps are important. The
23 16 area --

24 THE COURT: Is this the notebook that you presented?
25 I assume --

1 MR. FARMER: Yes.

2 THE COURT: -- you gave Mr. Calfo's team a copy of
3 this?

4 MR. FARMER: Yes, Your Honor, we provided a copy. We
5 also have it available on the screens.

6 THE COURT: All right.

7 MR. FARMER: And all of the content in here are from
8 exhibits either presented by plaintiff in their supporting
9 declaration of Mr. Weaver or with our opposition brief.

10 THE COURT: Keep your voice up a little.

11 MR. FARMER: Slide 2 is from Appendix A. This shows
12 plaintiffs' proposed class area and the borders here in
13 yellow. It also shows the Red Zone that Your Honor
14 referenced earlier.

15 Your Honor, in your March 17th minute order, which is
16 Docket 90, you asked several questions. And while we
17 understand that they were directed to the plaintiff, we'd
18 like to address those as well, because we think that they
19 bear on issues relevant to the motion before you today.

20 You asked whether plaintiffs intended to include Greenus,
21 Madrona Real Estate Investors IV, and Madrona Real Estate
22 Investors VI within the class, and as you pointed out, some
23 of these businesses are located outside of the proposed class
24 area.

25 If you look at Greenus, it's Number 20, over at Summit and

1 East Pike Street, several blocks from the proposed class
2 area. The Madrona entities are over to the east of the
3 proposed class area, much closer -- in fact, on the same
4 block and some just across the street.

5 Plaintiff did not include these properties in the class,
6 presumably, based on their location, but they allege the
7 identical claims as all other named plaintiffs, including the
8 other properties owned by Hunters Capital and Madrona
9 affiliates. Those claims are taking, nuisance, negligence,
10 and substantive due process, as well as procedural due
11 process violations.

12 And in the list of common issues that plaintiffs have
13 filed with the Court, which you discussed earlier, they refer
14 to some of the issues that must be discussed as follows: For
15 takings, did the City's actions interfere with the ability to
16 access properties? Did the City's actions interfere with the
17 ability to exclude others from properties?

18 THE COURT: Well, Mr. Farmer, let me ask you this:
19 Some of these properties are outside their class area that
20 they're proposing, but even if I certified a class and they
21 weren't in that class, they've got a claim in this case; do
22 they not? We'd have to have their trial at some point,
23 either together with the class or separate, but they've got
24 claims; do they not? They've got the same claims that
25 everyone else has that are in the class area; isn't that

1 right?

2 MR. FARMER: That's correct, Your Honor, and --

3 THE COURT: So they're not going to go away if I
4 certify a narrower class. How do we deal with that?

5 MR. FARMER: We should deal with that exactly as we
6 should deal with all of the claims of the plaintiffs within
7 the class area, and that is to deny certification and proceed
8 to trial in October.

9 The reason why there should be individual --

10 THE COURT: And let me ask you this: Let's assume I
11 denied the class. Do they all go to trial at the same time?

12 MR. FARMER: Your Honor, first, of course, there
13 would be dispositive-motion practice, and for those
14 plaintiffs with any claims that survive the
15 dispositive-motion practice, we think that they should all go
16 to trial at the same time. And the reason, again, goes back
17 to, all of these plaintiffs have made the same claims against
18 the City. All of these plaintiffs, whether they're in the
19 class area or outside, have predicated those claims on
20 identical factual allegations.

21 THE COURT: But you have three different -- totally
22 different kinds of plaintiffs here. You've got the property
23 owners, you've got the businesses, and you've got the
24 individuals who reside in the area. Is that manageable to
25 try all of those at the same time in the same trial?

1 MR. FARMER: Your Honor, we think that it is, and
2 there are two individual named plaintiffs. There are a
3 handful of property owners, and most of those are actually
4 owned by Hunters Capital, which, of course, is the lead named
5 plaintiff, and we believe all of those could efficiently be
6 tried as to the individual claims. And the reason why that's
7 important is right here on the map. If I can go to Slide
8 Number 3, what we've done here is placed boxes around the
9 plaintiffs that are outside of the class area, and those are
10 on the bottom left and bottom right. Those are in red.

11 THE COURT: We didn't need the boxes to see that, did
12 we?

13 MR. FARMER: No, Your Honor, but it's fancy
14 technology. I apologize.

15 THE COURT: So let's move on, then.

16 MR. FARMER: So, Your Honor, if you look to the top
17 right of the class area, you also have a block there between
18 12th and Howell, and the northern boundary of that is Denny
19 Street. Our point is that you can't prove liability as to
20 Building 21, which is over on the left, by evidence that
21 there was some interference of access at Building 15,
22 directly adjacent to Cal Anderson Park. The fact that
23 they're not --

24 THE COURT: Well, the fact that the damages are
25 different, there may still be proof of -- or evidence that

1 Building 21 was interfered with in some way. I haven't heard
2 the evidence, but it's possible that that's true, right?

3 MR. FARMER: Your Honor, that's true, and I'd like to
4 make a clear distinction. I'm not talking about damages.
5 I'm talking about the specific common issues of fact that
6 plaintiff has identified here, the interference of ability to
7 access properties, which is one of the takings, three
8 subclasses, that they would like, one of the common issues.

9 THE COURT: Well, let's talk about the substantive
10 due process and the policy at the City. Does the City
11 concede that there was established some sort of policy as to
12 how they were going to deal with this area?

13 MR. FARMER: By "this area," Your Honor, you're
14 referring --

15 THE COURT: Well, let's take the red dotted lines.
16 That was the area -- didn't they limit what type of fire or
17 police response would occur in that area?

18 MR. FARMER: Yes, Your Honor. That's the Red Zone.

19 THE COURT: Was that a policy?

20 MR. FARMER: That was a specific-response policy for
21 the Seattle Fire Department.

22 THE COURT: It was a no-response policy, wasn't it?

23 MR. FARMER: Your Honor, that's not the case. It's
24 important to note that there was a response policy, which was
25 that, in order to make sure that the situation was stabilized

1 on the ground, SPD had to go there first, and that's
2 consistent with a policy that's implemented citywide,
3 frankly. And for this specific area, because of the
4 unveiled -- pardon me -- because of the unprecedented events
5 that were unfolding, the Seattle Fire Department asked to
6 make these specific borders. Chief Scoggins, in his
7 deposition, testified clearly that that modified response was
8 only for this Red Zone. And it's important to note that --

9 THE COURT: And the Red Zone is the dotted lines?

10 MR. FARMER: Yes, Your Honor, that's correct. And --

11 THE COURT: Was that always the same -- the dotted
12 lines reflect an area where that policy was in effect for
13 what period of time? Did that go into effect on the 1st or
14 on the 16th of June?

15 MR. FARMER: Your Honor, it wasn't at the very
16 beginning. On the 1st, the police declared a riot during the
17 protest, and then there was a shooting subsequent to that. I
18 believe it was on June 6th. And someplace in between
19 June 6th and June 16th, this Red Zone was implemented in
20 order to make sure that the fire department didn't go into an
21 unsafe situation and make it worse.

22 THE COURT: And when did that go into effect?

23 MR. FARMER: Your Honor, I believe it was the middle
24 of the month, but I don't have the --

25 THE COURT: I think it was the 16th of June,

1 actually. And it ended on July 1?

2 MR. FARMER: Yes, Your Honor.

3 THE COURT: So for that 16-day period or 15- or
4 14-day period, there was a policy by the City as what the
5 police and the fire department would do in this area; is that
6 right?

7 MR. FARMER: With respect to the response time, but
8 there's no allegation from any of the plaintiffs -- and
9 there's been no evidence in discovery -- that any of the
10 plaintiffs were affected whatsoever by that policy. There's
11 none. And --

12 THE COURT: Well, but when we're dealing with whether
13 to certify a class, we shouldn't be concerned about
14 differences in damages, should we? I mean, if they can't
15 prove the damages, they can't prove the damages, but that
16 doesn't mean that there wouldn't be certain issues which
17 would be common that would help us resolve this litigation;
18 isn't that true?

19 MR. FARMER: Your Honor, this doesn't go to damages.
20 Again, this goes to proving liability, and in order to prove
21 liability under either of the due process claims, the Court
22 necessarily will need to evaluate individual facts specific
23 to the location of the plaintiffs. And even within the Red
24 Zone, there's evidence -- whether it's access or emergency
25 response time -- there's evidence that shows there's a wide

1 variety of conditions depending on the location, the date,
2 and the circumstances.

3 THE COURT: Well, you know, one of the parties --
4 perhaps the plaintiffs -- cited the *Hickey* case, which was
5 the WTO riot and Judge Pechman's certification on an issue.
6 How does that case relate to our case?

7 MR. FARMER: Your Honor --

8 THE COURT: If it does.

9 MR. FARMER: -- there's no relation whatsoever.
10 Counsel, earlier, described this as being a 16-block
11 takeover, but that's not what happened. This was not a
12 sci-fi movie with huge gates put up and everyone cordoned off
13 and stuck in 16 blocks. This is not *Hickey*, where you have a
14 specific government action with a specific population.

15 THE COURT: Well, you had all of the protesters in a
16 particular area that were made into a class, were they not,
17 in *Hickey*?

18 MR. FARMER: In *Hickey*, yes.

19 THE COURT: Yes. Why isn't that analogous to this
20 case?

21 MR. FARMER: Well, in *Hickey*, the class of persons
22 and their activities were identical. In *Hickey*, the
23 government action taken vis-a-vis those people was identical
24 across the board.

25 In this case --

1 THE COURT: Well, but their damages weren't
2 identical. They had different -- what happened to *Hickey*, I
3 mean, after Judge Pechman's order? Was it ultimately settled
4 by the City?

5 MR. FARMER: Your Honor, I believe so, but I don't
6 know, standing here. I apologize.

7 THE COURT: All right. Well, I don't know either,
8 but I -- well, I'll look it up. But what's the difference?

9 MR. FARMER: The difference is that, in that case,
10 the factual allegations were common, and that case was
11 susceptible to being proven in one fell swoop. There's
12 either liability or there's not. Here -- and importantly,
13 we're not talking about damages. We're not talking at all
14 about proving damages. We're talking about establishing
15 causation, which is an essential element of each of the
16 causes of action. And --

17 THE COURT: Well, there's substantive due process,
18 the second cause of action. One of the proposed issues is
19 whether there was actions or statements taken pursuant to a
20 City policy. That's a pretty common question that would move
21 the case along, would it not, with respect to substantive due
22 process?

23 MR. FARMER: Your Honor, I think that it's true that
24 you could look at the discrete question of whether there were
25 actions or policies, but that's totally removed from whether

1 or not those actions or policies created any actual
2 particularized or foreseeable danger. And that element of
3 the claim requires going back to the map and going to the
4 specific location, the specific time, and the circumstance
5 experienced by the property owner.

6 THE COURT: Why couldn't I certify that question as
7 well then, whether or not the policy resulted in or created
8 or exposed a class to an actual particularized danger that
9 the class would not have otherwise faced? I mean, why isn't
10 that a common question?

11 MR. FARMER: Your Honor, it's a common question in
12 theory, but applied to the 16 blocks at issue, it can only be
13 answered on an individualized basis. So, for example, if
14 you're at Location 12, which is where Plaintiff Wade Biller
15 resides in an apartment, he may have experienced some sort of
16 impact from protesters that's completely different than
17 anything experienced, hinted at, threatened at people who
18 were up at 12th and Howell.

19 THE COURT: But aren't you essentially arguing that I
20 can't certify common questions because the damages either
21 might not exist or would be different in character or amount?
22 Is it really -- you're saying you can't certify these
23 questions because damages are different?

24 MR. FARMER: No, Your Honor, I'm not saying that at
25 all. I'm saying you can't certify these because each of the

1 claims requires individualized proof of action, causation,
2 not damages. And going back to --

3 THE COURT: But what does "causation" mean? Caused
4 damages. Isn't that what the causation prong is all about?

5 MR. FARMER: Your Honor, there needs to be some sort
6 of deprivation of right. This can't be, "I don't like bike
7 lanes," and therefore, because there are bike lanes on 4th
8 Avenue, I've got a constitutional law claim against the City.
9 This has to show an actual impact. This is a particularized
10 danger, and here, the plaintiffs have not actually tried to
11 put any evidence in.

12 And to go back to the case we discussed earlier, the Ninth
13 Circuit's en banc decision in *Olean* is instructive on two
14 points that bear noting. First, on this motion, plaintiffs
15 bear the burden of proving facts necessary to establish that
16 the prerequisites of Rule 23 are satisfied. They've got to
17 do so by a preponderance of the evidence.

18 *Olean* also stands for the proposition that, in order to
19 obtain certification, plaintiffs must be able to prove harm
20 on a classwide basis.

21 THE COURT: Is there any issue on standing here?

22 MR. FARMER: Your Honor, I think that that actually
23 does get us into Article III standing, because at the outset
24 of this case, in June of 2020 -- I think they filed on
25 June 24th -- you had a bunch of very upset property owners,

1 business people, and residents. They filed as a class
2 action, and initially, they threatened to go get a TR0. They
3 wanted equitable relief. Since then, they've obviously
4 abandoned those claims. They're looking for damages.

5 In order to maintain a class action for something other
6 than equitable relief, you need to show that each class
7 member has standing, and there's no evidence before the Court
8 that shows that.

9 THE COURT: Well, first, we dealt with standing, I
10 believe, in the motion to dismiss, but more importantly, when
11 this motion for class certification was raised, Mr. Calfo's
12 office, in their brief, talked about standing. I don't think
13 your opposition brief talked about standing at all. It
14 wasn't mentioned in your response.

15 MR. FARMER: Your Honor --

16 THE COURT: I mean, that seems to me to suggest that
17 the City concedes there's standing there.

18 MR. FARMER: Your Honor, the City does not concede
19 that there's standing here, because --

20 THE COURT: You would normally put that in your
21 brief, wouldn't you?

22 MR. FARMER: Yes, Your Honor, that should be included
23 in our brief, and I'm glad that it came up today, because the
24 City's position, crystal clear, is there's not evidence that
25 demonstrates that each and every class member has standing at

1 this point.

2 THE COURT: Well, but each and every class member --
3 does each and every class member need standing? Don't we
4 have -- if there's a class, if one or more people have
5 standing, we've got Article III standing and I can hear the
6 case. You're not suggesting that I have to throw this case
7 out because there's no Article III standing for any of these
8 plaintiffs, are you?

9 MR. FARMER: No, Your Honor, I'm not suggesting that.

10 THE COURT: All right. I didn't think so, so let's
11 move on.

12 What cases do you think are most favorable to your
13 position with respect to the fact that we should not certify
14 a class here?

15 MR. FARMER: Your Honor, I would start with the
16 recent Ninth Circuit decision from *Olean*, because I think
17 that that stands clearly for the proposition that the
18 plaintiffs must be able to prove harm on a classwide basis.
19 They have to prove it in unison, and in this case, that's not
20 possible.

21 In *Olean*, they presented expert evidence, the Statistical
22 Regression Model, and that was evaluated by the District
23 Court over a three-day evidentiary hearing. In this case, we
24 have nothing. We have nothing except anecdotes of people,
25 businesses mostly in the zone very close to Pine Street and

1 11th.

2 On the record before you today, there is not a single
3 piece of evidence of any impact going north of there, not
4 any, and that does not carry the burden that the plaintiffs
5 have on this motion.

6 THE COURT: Well, but they've only asked for class
7 certification on issues of liability. They did not ask for
8 certification on damages; isn't that right?

9 MR. FARMER: That's correct, Your Honor, but issues
10 of liability, as again set forth in their own summary of
11 common questions, include answering individualized inquiries
12 regarding whether or not a property owner had its rights
13 interfered with. And if we go through the evidence, we'll
14 see that there's no evidence whatsoever that property owners,
15 in probably half of the class area, no evidence that any of
16 those property owners experienced any deprivation of access,
17 any loss of rights.

18 THE COURT: Well, let's take the other half, then.
19 What you're suggesting is that maybe there's some property
20 owners in this proposed class area that did experience some
21 sort of deprivation of their property rights because of
22 this -- I'm going to call it -- "policy." I guess the City
23 called it a policy.

24 MR. FARMER: So, Your Honor, two things: First, I
25 don't think that the City had any policy of allowing people

1 to go onto private property whatsoever. That's not the case.

2 Now, what the City did throughout this time period is --

3 THE COURT: Well, the City had a policy of what they
4 were going to do and what they were going to allow in this
5 area, and they had a policy, did they not, with respect to
6 response times and how they were going to deal with problems
7 that occurred?

8 MR. FARMER: Your Honor, the City had a policy with
9 regard to the Seattle Fire Department protocol. With regard
10 to the rest of this incredibly-evolving situation, the City
11 and the various employees who worked literally night and day
12 over that month, they formulated a plan to try to de-escalate
13 to avoid violence, to avoid arson and damage to property
14 while also providing and respecting First Amendment rights of
15 protesters. And it's important to note that all of this is
16 happening in the context of COVID-19, where people had been
17 shut down in terms of businesses, working remotely, not even
18 going into the office, and the City was trying to do their
19 best under the most difficult circumstances.

20 And in that context, whether or not you could call it a
21 "policy," I don't think so. What the plaintiffs have done is
22 try to throw up 30 different ordinances, saying this one
23 wasn't enforced here, this one wasn't enforced there, but
24 again, that's 30 different questions. And what they haven't
25 done is show any evidence of common impact to all of these

1 5,000 putative class members. What they haven't done is show
2 a single policy that impacted each and every one of these
3 5,000 class members.

4 THE COURT: But do they need to do that? In other
5 words, in order to certify a common question, they don't need
6 to show, do they, that that question -- that everyone in
7 their proposed class were impacted, would have damages.
8 Doesn't *Olean* tell us that the fact that some people in the
9 class don't have any damages doesn't defeat certifying a
10 class and issues to be determined on a classwide basis?

11 MR. FARMER: Your Honor, you're correct, that's what
12 *Olean* says. And they talk about --

13 THE COURT: So how is it that the fact that -- let's
14 say that half of them had no damage at all. Some of them
15 even liked what happened. How does that prevent the Court
16 from certifying a class of common issues so that we can get
17 to the bottom of this? Isn't that a better way to handle
18 this case than to certify nothing?

19 MR. FARMER: No, Your Honor, for several reasons.
20 First, if you were to say that half of the people were not
21 impacted -- again, I'm not talking about damages, I'm talking
22 about impact -- half of these putative plaintiffs never had
23 anyone come close to their property, then that would, on its
24 face, I believe, violate the rule that *Olean* is saying.
25 *Olean* is saying it's okay if you have this massive class,

1 even though there are going to be some, let's call them,
2 false positives among this otherwise massive class, you can
3 still certify it, and there are lots of reasons why that
4 makes sense, because you've got the bulk, the actual mass,
5 directing the ship. In this case, you'd have the opposite.
6 You would have all of these different groups with different
7 experiences, and you'd be certifying things that would be
8 dominated by individual questions of fact going forward, and
9 that would include all sorts of things on this complete waste
10 of space in terms of thousands of businesses, residents, and
11 property owners who were nowhere near anything that was going
12 on.

13 And it's important, Your Honor, to focus, again, on Pine
14 Street, 11th and 12th Avenue on our map.

15 THE COURT: All right. We're back to your exhibit on
16 the screen?

17 MR. FARMER: Yes, Your Honor.

18 THE COURT: All right. I've asked too many questions
19 already, so I'll let you go ahead with your presentation.

20 MR. FARMER: Thank you, Your Honor. So, Your Honor,
21 our point is that, even within the closest proximity to East
22 Pine and 11th, even within the closest proximity to the East
23 Precinct, the plaintiffs' own evidence shows that different
24 individuals had different experiences based, again, on their
25 location, the time, and the circumstances.

1 So, here, on Slide 5, we have the testimony of
2 Mr. McDermott, who was the owner of Car Tender, and as to the
3 point of access, he's asked -- they blocked the sidewalks --
4 "Okay, did they block the driveway to get into the parking
5 lot?" And his answer is, "As I stated, they did not block
6 the driveway to access our parking lot." So we have these
7 allegations in a Complaint, and then we have evidence that
8 does not match up to it. We have evidence that instead shows
9 that individual plaintiffs very close to the main areas of
10 protest activity actually did have the access that
11 plaintiffs' counsel claims was denied.

12 THE COURT: Well, but even if we were here sitting at
13 summary judgment stage and you presented the evidence of one
14 person who said, "Well, they didn't block my access," that
15 doesn't get you summary judgment. That just gets you, maybe
16 that plaintiff doesn't have any recourse, any damages; isn't
17 that right?

18 MR. FARMER: That's correct, Your Honor, and --

19 THE COURT: But there are lots of other people that
20 would be in this class area who might have a different view.
21 We have to wait for that evidence, don't we?

22 MR. FARMER: Your Honor, this class certification
23 motion was filed on an agreed-upon schedule. We're almost
24 two years down the road from when the lawsuit was filed.
25 It's not the City's burden. This is not a motion for summary

1 judgment. It's the plaintiffs' burden to prove that there
2 are common questions of fact that can be resolved in one fell
3 swoop. And so the point of that excerpt is to show that,
4 even amongst the plaintiffs' themselves, even amongst those
5 people who were closest to the epicenter of all of this crazy
6 activity, there is not commonality. There are differences.
7 There are differences in who gets in a driveway, there are
8 differences in who could go to their work, there are
9 differences in interactions with protesters. This myriad of
10 complexity is exactly why this class cannot be certified.

11 THE COURT: All right, go ahead.

12 MR. FARMER: So, Your Honor, again, a named plaintiff
13 at Slide 6 -- this is Matthew Ploszaj -- and I believe on
14 Slide 6, at the bottom, highlights -- the question was, "Was
15 your access to your apartment restricted in any other way
16 than having to show ID?" And he answers, "I would have to
17 walk through crowds to get to the point where I could show my
18 ID."

19 THE COURT: Was he the only proposed class
20 representative for the third class, the individual, or are
21 there others?

22 MR. FARMER: Your Honor, I believe that there's a
23 gentleman named Wade Biller who was also a resident.

24 And so, Your Honor, going back again to Mr. Ploszaj's
25 testimony, in his June 10th deposition, he's asked, "Could

1 you access your building by car?" "No." He's asked, "Could
2 you access your building by foot?" "Sometimes."

3 And I won't belabor the point, but his own access depended
4 on what happened on specific days, and his best evidence is
5 that, on a handful of occasions, he was prevented from
6 entering his building. The City does not diminish that
7 concern whatsoever. That's a serious concern, but that
8 doesn't make it a class question, because it doesn't tell us
9 anything about what happened to the apartment building two
10 doors down, and it certainly can't tell us anything that
11 happened four blocks north, just as the plaintiff, when they
12 try to prove up --

13 THE COURT: Why isn't that a damage issue as opposed
14 to the common question of whether or not there was a taking
15 of and whether the City's actions interfered with people in
16 the class area from accessing their properties?

17 MR. FARMER: Your Honor, it's not a damages claim,
18 because it's an essential element of proving liability. It's
19 not a damages claim because, under the Supreme Court case
20 that was referenced earlier, an essential element of proving
21 a taking is to prove that you were prevented or that --
22 prevented from accessing or that your property was, quote,
23 misappropriated. It was taken away. And so in order to
24 establish liability against the City, Mr. Ploszaj needs to
25 show that his property was taken away, and the evidence that

1 he must put forward to do that is, by definition, individual
2 to him and his experience. It's not the same as the owners
3 of the Greenus Building, who are three blocks away. It's not
4 the same as the owners of Car Tender. Each of these named
5 plaintiffs had a different experience. Each of the 5,000
6 putative class members will have a different experience, and
7 for liability on each of the claims, that must be done on an
8 individualized basis.

9 THE COURT: Would you ever have a class -- you're
10 always going to have differences in damages, aren't you, in
11 class certifications? I mean, take the buyers of the tuna in
12 *Olean*. You have three different groups. They're all going
13 to have different experiences. Some of them may not have
14 tried to buy tuna during that class period, some of them may
15 have only bought a little bit of tuna. I mean, isn't that
16 always going to be the case?

17 MR. FARMER: Your Honor, it's not always the case,
18 because there could be things like a cell phone overcharge
19 where every class member was overcharged a buck 50, and you
20 can look it up in the records. But in many, many class
21 actions, there will be differences in individual damages.

22 However, that's not the issue on this motion. At issue on
23 this motion, even by plaintiffs' own summary of the relevant
24 common questions, is whether there was interference with the
25 ability to access properties, whether there was interference

1 with the ability to exclude others. These are not damages
2 questions. These are core liability questions, and they must
3 be addressed on an individual basis for each of the 5,000
4 class members.

5 THE COURT: One of the cases that was cited by the
6 parties -- I don't know if it was your brief or the other
7 brief -- was *Jimenez v. Allstate Insurance*, Ninth Circuit,
8 765 F.3d. Can you tell me about that case? The District
9 Court certified a class with respect to unpaid overtime and
10 said the payments -- and unfair competition. And the Ninth
11 Circuit allowed three questions to be certified. Are you
12 familiar with the case?

13 MR. FARMER: Your Honor, I've read it. I'm sorry, I
14 don't have my summary in front of me.

15 THE COURT: All right. Well, they said the three
16 questions were: Did they work overtime, did Allstate know
17 that the work was unpaid overtime, and did the defendant
18 stand idly by and allow this off-the-clock claim under
19 California law? And the court said that they were common
20 questions apt to drive the resolution of the litigation.
21 Why isn't that kind of a case important in deciding whether
22 we have class certification?

23 MR. FARMER: Your Honor, that case is closer to
24 *Hickey* than where we are today. Your Honor, that -- the
25 *Jimenez* case is closer to *Hickey*, where you have a defined

1 set of people. Here, you're talking about employees. This
2 is basically fishing in a small pond when you look at that
3 case. If you take it to where we are here, we're out in the
4 Puget Sound. You've got 5,000 putative plaintiffs, each with
5 very important claims, but there's no possible way to resolve
6 those claims in one fell swoop.

7 THE COURT: Well, you know, Mr. Calfo has selected
8 his proposed class area, but the whole City of Seattle was
9 affected by what happened in that area; isn't that true?

10 MR. FARMER: Your Honor, in June of 2020, the City of
11 Seattle convulsed. The entire country convulsed. We all
12 were affected throughout the City, and we had been affected
13 earlier than that with COVID, and we saw the increased number
14 of people without homes and graffiti and --

15 THE COURT: You better be careful, Mr. Calfo will
16 want to expand his class to the City of Seattle.

17 All right.

18 MR. FARMER: Your Honor, if I may proceed, I'd like
19 to make just a few points.

20 THE COURT: Yes.

21 MR. FARMER: Again, while the plaintiffs have
22 complained vehemently about conditions adjacent to their
23 properties, they've not focused with much success on any
24 specific policy that caused harm common to all the putative
25 class members. Three of the areas where they've complained

1 the most are services. They complain that the City didn't
2 provide trash collection services for the entire class area.
3 They complain again about the Seattle Fire Department
4 protocol that we discussed earlier, and they also complain
5 about barriers. And if you dig into each one of these
6 different areas of complaint, you find very near the surface
7 all of these differences based on the location, the time, and
8 the individual plaintiff and how they were affected or
9 weren't affected. That's very important here.

10 In order to certify a class, you have to find that there
11 could be common proof of impact for each of these claims, and
12 that's the who, what, when, where. It's like a newspaper
13 story. And right now, no one's done anything to address,
14 were people even there because of COVID-19? Before we even
15 get to the "what," were they there when whatever happened
16 happened, and we don't know what happened. These are all
17 vacant from the pleadings before you. There's no evidence of
18 classwide impact, and at this juncture, that merits denial of
19 their motion.

20 THE COURT: But your argument -- I'm just looking
21 forward to the motion practice we're going to have. You are
22 going to be moving to dismiss all of these claims for various
23 reasons, but haven't you just told me that there's a factual
24 issue as to whether there were damages or whether these
25 services were interrupted or whether the property access was

1 interrupted? Aren't I going to have to decide that there's
2 factual issues on all of these questions?

3 MR. FARMER: Your Honor, at the motion for summary
4 judgment stage, you may find that there are factual issues on
5 all of these questions. The evidence that I'll go through
6 now actually would show you that, as to any plaintiff who
7 claims that they were damaged because they were deprived
8 trash service, we probably have evidence sufficient to show
9 that summary judgment should be granted as to that, but we
10 are here today on class certification.

11 And the point of this evidence is that even the named
12 plaintiffs closest to the epicenter actually had different
13 experiences regarding whether or not their trash got picked
14 up, and that's because whether it's barriers that get moved
15 twice a week or four times a week or trash service that
16 misses a Tuesday but shows up on Thursday, all of this is
17 incredibly dynamic. These facts are literally burping up
18 from the springs as things happen, and that is a fact pattern
19 that is not suited for class action.

20 There is no case anywhere -- and we scoured Westlaw --
21 there's no case with facts like this. There are so many
22 moving pieces here and 5,000 different class members. As
23 Mr. Calfo said, they have a diverse group of representative
24 plaintiffs. We have something exponentially more diverse
25 when you get into the different class members, 5,000, spread

1 across 15 city blocks. I would submit to you, Your Honor,
2 that there's no way of classwide proof for any of these
3 claims, just as the plaintiffs acknowledge that the classwide
4 proof shouldn't include their own buildings, some of them two
5 blocks away, some of them one block away from the class area.
6 This is powerful evidence that there is no way to answer
7 these questions with common evidence.

8 THE COURT: Well, how would you -- if I did not
9 certify a class, how would we try this case?

10 MR. FARMER: Your Honor, we've got --

11 THE COURT: We've got 26 plaintiffs, give or take.

12 MR. FARMER: So, Your Honor --

13 THE COURT: They're all going to come in and have
14 different diverse theories and claims and damages. How long
15 would that case take to try?

16 MR. FARMER: Your Honor, I think that case would take
17 a month to try, but it could be shorter, depending on the
18 dispositive-motion practice, and the City intends to bring
19 dispositive motions based on some of the evidence we've got
20 in our briefing. Today's question, again, goes back to
21 certification, and the plaintiff has not met their burden of
22 putting forth evidence showing the common questions, showing
23 there's common proof available.

24 THE COURT: Well, Rule 23 contemplates that a motion
25 for class certification will be promptly brought early in the

1 litigation. Do you know of anything that would counsel for
2 or against deferring a ruling on class certification and
3 going to motion practice and seeing where we were?

4 MR. FARMER: Your Honor, I don't know of any legal
5 authority, but my grasp of the facts in this case tells me
6 that that's not going to tell us anything about class
7 certification. The evidence before you tells us everything
8 we need to know. The plaintiffs' own declaration with
9 various deposition transcripts tells you all of the
10 variations among the named plaintiffs, not just the 5,000
11 class members, within the named plaintiffs.

12 So, on this record, after nearly two years, when we have
13 expert reports to be exchanged next week, we ought to saddle
14 up and get to trial in October and take care of that. And
15 they'll have their day in court for each of the named
16 plaintiffs, and these are not insignificant claims. The
17 Hunters Capital folks claim over \$3 million in damages. So
18 we can have the trial in October and resolve these issues in
19 a very fair way, but what we shouldn't do is get sidetracked
20 by trying to sweep up some 4,900 people when we don't know
21 where they were, when they were there, or what happened.

22 THE COURT: All right. Go ahead.

23 MR. FARMER: Your Honor, I'll wrap it up here.

24 I wanted to point out one issue. Earlier, you heard about
25 Mr. Fox, who put in a declaration, and Mr. Fox is the owner

1 of Poquitos, which is a shop and I think a tenant of the
2 Plaintiff Hunters Capital, and here I am at Slide 23. And
3 this, again, was the Farmer Declaration, Exhibit 41,
4 submitted with our opposition. I apologize that the type is
5 small.

6 Your Honor, in this email exchange between Mr. Fox and
7 Ms. Cronauer, who's, I think, the COO of Hunters Capital,
8 they discuss whether or not to file a lawsuit. That's not
9 important. What's important is that Mr. Fox here, on
10 June 14th -- so this is less than a week after the class
11 date -- he writes to his landlord in the second highlighted
12 sentence, "Other than being closed for the two days out of
13 concern for the staff and losing a limited amount of sales
14 due to doing take-out sales, which was our choice, it's
15 nothing worse than we're dealing with the protests and
16 nightly dispersals."

17 If you go down to Ms. Cronauer's email to him, written the
18 day before, June 13th -- and again, this is the chief
19 operating officer of Hunters Capital -- she writes to him,
20 "After visiting the CHOP today, it seems best to wait on
21 filing the lawsuit. As you are well aware, the neighborhood
22 saw more positive energy today than in the last nine months.
23 People came from far and wide to the only festival allowed
24 for the foreseeable future, which created a very inviting and
25 safe vibe, which has been shared widely in the media."

1 Your Honor, this isn't summary judgment evidence that they
2 don't have claims. We take the claims very seriously. But
3 this shows that on that day, in that place, in this class
4 area, there were no particularized dangers. There were no
5 threats, and self-evidently, there was no impairment of
6 access.

7 THE COURT: Well, but what this shows is that this
8 one person writing this email on that particular day had that
9 opinion. It doesn't really tell us anything else, does it,
10 about what other people were incurring in the way of
11 consequences as a result of all this disruption up there in
12 the CHOP area?

13 MR. FARMER: Your Honor, that's exactly right. This
14 is her individual experience based on where she was. It
15 tells us nothing about what was happening two blocks north,
16 just like the allegations, and even a copy of the City policy
17 issued afterwards tells us nothing of whether there was
18 deprivation of rights, intervention of access, and other
19 problems. All of those are individualized inquiries. The
20 class cannot be certified. Thank you, Your Honor.

21 THE COURT: If I do not certify a class -- that's
22 your position -- do you think the case can be tried in a
23 month with respect to all of these plaintiffs?

24 MR. FARMER: Yes, Your Honor.

25 THE COURT: And are you saying two weeks a side?

1 MR. FARMER: Yes, Your Honor. I think that we would
2 be put on a clock, and if we do it diligently, we'd cooperate
3 with co-counsel and --

4 THE COURT: You'd be put on a clock. That is a
5 certainty.

6 So if we had a class trial, how long would it take?

7 MR. FARMER: Your Honor, I think that would depend a
8 little bit on the class, but once your order comes out on
9 that, the parties may well decide that there might need to be
10 some degree of additional discovery, but I think that it
11 would probably make the trial at least another 50 percent
12 longer.

13 THE COURT: Why?

14 MR. FARMER: Why? Because I think we would have to
15 bring in each of the individuals and test their evidence
16 regarding liability, which I guess we would have to do that
17 in either case, but --

18 THE COURT: And would we bifurcate damages, or would
19 we try damages -- regardless of what the Court does, would we
20 try damages at the same time?

21 MR. FARMER: I don't think that that's practical to
22 do if there were a class, but it's certainly something we can
23 do in October based on the named plaintiffs' extant claims.

24 THE COURT: There are 26 different plaintiffs. The
25 damages conceivably could be fairly extensive with respect to

1 these various 26 plaintiffs. Would that not be true?

2 MR. FARMER: Well, Your Honor, I think to both
3 parties' credit, discovery has dug into the individual
4 damages, and we've got fairly detailed accounts of their
5 records. That's, of course, not part of this hearing, but I
6 think that that's something that suggests we can do it on a
7 more efficient basis.

8 THE COURT: If it was a class trial, could we
9 bifurcate damages?

10 MR. FARMER: Yes, Your Honor, I think that you would
11 have discretion to do so, but for all the reasons I mentioned
12 earlier, I don't think that there could be a class.

13 The other point I'd like to --

14 THE COURT: I understand your position there.

15 MR. FARMER: I'm sorry, I don't mean to beat the drum
16 too much. Your Honor, you had mentioned in your more recent
17 minute order whether or not issue certification under
18 23(c)(4) would be appropriate, and we don't believe that that
19 would advance the case, because -- and there's case law
20 supporting the proposition -- if you're not going to
21 materially advance the case, that you shouldn't put off the
22 difficult decisions regarding whether or not there are common
23 questions of fact. So, under our agreed schedule and under
24 the briefing that we have today, you have squarely in front
25 of you that difficult question of whether or not there are

1 common questions of fact, and the answer is no.

2 THE COURT: All right. I think I understand your
3 position. Thank you.

4 MR. FARMER: Thank you, Your Honor.

5 THE COURT: Mr. Calfo, you've got 10 minutes, I
6 think.

7 MR. CALFO: Thank you, Your Honor. I think the
8 fundamental problem with the City's argument is that it's
9 working from the ground up, talking about different
10 experiences of plaintiffs or class members, and our motion
11 works from the bottom down -- or from the top down, because
12 what we're doing is we're saying, Judge, these are the common
13 issues. Let's look at the issues themselves and ask
14 ourselves whether or not those issues can be decided without
15 reference to the divergence of experiences of individual
16 class members of plaintiffs. That's what we would ask the
17 Court to do when it analyzes this case, and I know it will.
18 When you look at those questions, as I went over in my
19 opening argument and I won't repeat here, our goal was to
20 frame them so that it entirely focused or materially focused
21 on the conduct of the City or the City's policies, not on the
22 experiences of individual plaintiffs.

23 I think, with respect to these differences in opinion over
24 what the facts are going to show, it doesn't really bear on
25 our 23(c)(4) issue. I mean, Mr. Ploszaj, for example, who

1 was highlighted in the City's brief, this individual, his
2 home was broken into four times, and the police didn't come
3 on any of the occasions. They told him to go to 23rd and
4 Martin Luther King to meet them there and he could talk to
5 the police, and then they never showed up. I mean, he's not
6 a good person for them to be highlighting as someone who
7 wasn't harmed here. He was really devastatingly harmed and
8 experienced threats of assault and burglary while he was
9 experiencing the CHOP.

10 And, Your Honor, you know, the City can say whatever it
11 wants here, but I go back to the emergency order. Not only
12 does the emergency order go over -- first of all, it defines
13 the area. So you can -- it's interesting to see these maps
14 they're putting together, but when the City was doing its
15 work in the emergency order, it defined the area that was
16 affected as the class area that we're proposing.

17 Now, they can try and argue -- I don't know -- at trial or
18 whatever that, really, the area that we said was affected
19 wasn't the one we affected or they can say, well, the area
20 that we put in our emergency order isn't really the area that
21 we facilitated, but I don't think they're going to get very
22 far. And this emergency order not only goes over all the
23 harm, the general harm, to people who were in this area they
24 defined, it talked about a lack -- a modifying of police
25 response protocols.

1 And by the way, the City officials said, regardless of
2 whether it was red or warm, our evidence is going to show the
3 police didn't come at all. And on many occasions, the fire
4 department couldn't even get into the warm zones because the
5 police weren't responding. We have individual plaintiffs who
6 say, "I called the police, and they said, 'We're not coming
7 to your area at all.'"

8 Car Tenders is an example. Mr. McDermott was assaulted
9 with a blunt instrument in his business. 500 people from the
10 occupants came charging in saying you have to release this
11 person who's burglarizing your place. They called the
12 police, and they didn't come. I mean, this idea that somehow
13 there wasn't the general impact that the City, itself, said
14 in the emergency order is really not -- it's a gross
15 mischaracterization of what the evidence will be.

16 But the thing about the emergency order is it not only
17 describes what the City says is the zone that it facilitated,
18 it not only describes the things that happened to everybody,
19 like not having, you know, police response and obstructions
20 to public parks, streets, and sidewalks -- that's what it
21 says -- it also describes, in detail, some of the impacts on
22 the neighborhood, like SPD has received numerous reports of
23 narcotics use and violent crime, an increase of 525 percent
24 in crime in the CHOP zone. And we're talking about whether
25 somebody got onto their sidewalk on a particular day, got

1 blocked?

2 I mean, this -- again, Your Honor, the notion that we
3 haven't shown harm to these folks, economic harm, harm from
4 lack of public safety, a lack of access to properties, is
5 really just -- it's just -- it doesn't characterize the facts
6 correctly, and the City's own evidence and the statements
7 from the police chief all show that to be the case.

8 But the real issue here -- and this is just like *Olean*,
9 Your Honor. You know, you had the tuna folks, the Bumble
10 Bees of the world, saying that, you know, this isn't a class
11 because, well, with respect to Wal-Mart, they had a higher
12 negotiating position. These mom-and-pop stores are really
13 different, they had a really different experience than the
14 big Wal-Marts, and the court said, no, that doesn't defeat
15 class cert.

16 I mean, there's going to be a divergence in the
17 experiences of the class members, and we will deal with those
18 at the damage phase. And you can argue as much as you want,
19 tuna manufacturers, but you're really just arguing facts, and
20 when you're dealing with a 23(c)(4) case, the issue isn't
21 whether or not the tuna manufacturers are right or the
22 purchasers are right, the question is, if we resolve the
23 common questions that have been identified, is it going to
24 advance the litigation.

25 So maybe the City will be right. Maybe they'll show there

1 wasn't deprivation, but in the end, that serves the purpose
2 of 23(c)(4), because that issue will be resolved for all
3 members of the class, and that's why these arguments over
4 what the facts show don't really matter to our motion.

5 Now, Your Honor, you asked about whether you should
6 certify the class now or later, and I think, from our
7 perspective, it will be important to certify the class now,
8 particularly before summary judgment, because then your
9 summary judgment rulings will be, you know, class-based
10 summary judgment motions. If there's no class before, then
11 we wouldn't have that opportunity.

12 The other thing, Your Honor, that I'd note is you have
13 broad discretion going forward to modify the definition of
14 the class or how this case is tried. I think we've made the
15 showing we need to make to show that the common questions
16 we've identified ought to be certified. As we finish with
17 discovery or through summary judgment, I think the Court has
18 the discretion to ask for briefing on whether or not the
19 class definition should be modified or other aspects of our
20 class certification should be modified, should the Court
21 grant our motion.

22 THE COURT: Let me ask you this, Mr. Calfo. I think
23 we have a trial date mid October. Is that realistic given
24 that motion practice is going to follow regardless of what I
25 do with these class certifications? It sounds like we are

1 going to have a lot of motion practice. Realistically, when
2 do you think this can be ready for trial?

3 MR. CALFO: Well, Your Honor, I think you make a good
4 point, and I think we could be ready in October, but I'd have
5 no objection, to allow for orderly decisionmaking on the
6 summary judgments, for it to be moved.

7 THE COURT: Refresh my memory on when the dispositive
8 motion cutoff is. Do you know?

9 MR. WEAVER: It's the end of June, Your Honor.

10 THE COURT: Thank you. That's when they need to be
11 filed?

12 MR. WEAVER: Yes.

13 THE COURT: End of June?

14 MR. WEAVER: Yes.

15 THE COURT: No doubt there will be many motions filed
16 regardless of what I do here on the class certification. And
17 if they need to be filed at the end of June, they won't be
18 briefed until end of July or mid August. We're not going to
19 decide those motions -- I mean, we won't have all the
20 briefing until August.

21 MR. CALFO: Yes, Your Honor. And we also have the
22 motion on the texts. There will be a motion related to the
23 missing texts.

24 THE COURT: Say it again.

25 MR. CALFO: We'll also have motions relating to the

1 missing texts and the consequences of that.

2 THE COURT: Is the discovery done on that? Can you
3 move those motions up? Should we address those, get those on
4 a fast track of some sort?

5 MR. CALFO: Well, Your Honor, our expert report is
6 due shortly, and I do -- we do want to promptly make the
7 motion. We want to make sure we have all the information we
8 need to make the motion.

9 THE COURT: Have you done all your discovery on that
10 issue, both sides?

11 MR. CALFO: Your Honor, I think there may be some
12 things to wrap up, but I think it's going to be soon, so...

13 THE COURT: Well, that sounds like an important
14 issue. Should we agree that motions with respect to that
15 issue should be brought in the next month or six weeks? Or
16 you tell me.

17 MR. CALFO: Your Honor, may I suggest that, after the
18 hearing, I get together with Mr. Harrigan's team and that we
19 figure out a good schedule for that?

20 THE COURT: It just seems like October is going to be
21 a -- you've got a lot of work to do. We all have a lot of
22 work to do if we're talking about -- is it mid October? If I
23 remember, it's like the 17th or something. Does that sound
24 right?

25 MR. CALFO: Yes, Your Honor. I don't know that it

1 matters, Your Honor, but I have a three-month trial starting
2 on September 19th. It may go away. I don't know. So, from
3 my perspective, it would be fine to move that, if it's
4 benefitting both, benefitting Your Honor's ability to get the
5 matters resolved in an orderly way, so...

6 THE COURT: All right. Anything else from a
7 case-management standpoint that we can discuss today from
8 your standpoint?

9 MR. CALFO: No. Only, Your Honor, I think to
10 emphasize that, if the Court goes forward and does certify
11 the class and we do try damages at the same time, which is I
12 think what we ought to do, the Court will -- I think that
13 it's important that we will get a lot of information out of
14 that trial about how to try future damage cases, if we're
15 successful, and of course, we think we will be.

16 It will also be a bellwether to try and resolve this case
17 overall, and that's the history and practice in reality of
18 the way these things work. I think that damages trial, I
19 think, is important to include in any trial that comes up in
20 October, if the Court does certify the class. We think that
21 the certification --

22 THE COURT: Well, as I understood your comments
23 earlier, you thought we should try damages together with
24 liability whether or not I certify; is that right?

25 MR. CALFO: That's right, Your Honor, but I'm

1 emphasizing that, if there is a certification, I think it
2 won't add -- it's not going to add appreciably to the length
3 of the trial if we try damages at the same time as it would
4 if we had no certification. And I think, including a damages
5 aspect to the trial, if there are certification of issues is
6 going to materially advance the litigation in the ways I've
7 discussed, including by providing bellwether damage awards
8 that might help us resolve the case overall.

9 THE COURT: All right. Thank you.

10 MR. CALFO: Thank you, Your Honor.

11 THE COURT: Anything further from the City?

12 MR. FARMER: Nothing on case management. Thank you,
13 Your Honor.

14 THE COURT: All right. Well, I certainly appreciated
15 all the briefing that I received and the arguments today.
16 We'll take the matter under advisement, and we'll issue an
17 order as soon as we can. We'll be in recess. Have a nice
18 day, folks.

19 (Proceedings concluded.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

/s/ Sheri Schelbert

SHERI SCHELBERT
COURT REPORTER